

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6080

To be argued by
MILTON S. GOULD

United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
against

INTERNATIONAL TELEPHONE AND TELEGRAPH COR-
PORATION and THE HARTFORD FIRE INSURANCE
COMPANY,

Defendants-Respondents,

and

AVIS, INC.,

*Defendant-Intervenor-
Respondent.*

ON APPEAL FROM AN ORDER OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT

**REPLY BRIEF FOR PROPOSED
INTERVENOR-APPELLANT**

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PRELIMINARY STATEMENT

This brief is submitted on behalf of proposed intervenor-appellant Fuqua Industries, Inc. ("Fuqua"), for the purpose of replying to the briefs filed by Avis, Inc. ("Avis"), Trustee Richard Joyce Smith (the "Trustee"), and the United States. This reply brief deals only with certain events which have occurred since the filing of the original briefs by the parties. With regard to other arguments raised by Avis, the Trustee and the United States, the Court is respectfully referred to Fuqua's main brief ("main br.").

SUPPLEMENTAL STATEMENT OF FACTS

A. The Second Fuqua Offer

The Trustee has filed a Supplemental Appendix which contains his Fifth Report (T 337a-T 340a*), a proposal by Norton Simon, Inc. to the Trustee (the "Norton Simon offer") (T 341a-T 346a), and an Order of the District Court dated June 7, 1977 (T 347a). As described in these documents and in the briefs of the Trustee (Trustee's br. 4-5) and Avis (Avis br. 4-6), Norton Simon, Inc., on or about June 3rd,

Numbers in parentheses following by "a" and preceded by "T"
refer to the Trustee's Supplemental Appendix.

made an offer to the Trustee to purchase the common stock of Avis held by the Trustee (the "Trust Property") for cash at a price of \$20.25 per share and committed itself either to make a cash tender offer for all other Avis shares outstanding at the same price or to affect a cash merger at the \$20.25 per share price. As a condition of its offer, Norton Simon required that the offer be approved by the District Court by June 22, 1977 (T 345a). Subsequently, the Trustee requested that the District Court issue an order authorizing and directing him to accept the Norton Simon offer (T 340a). The District Court has scheduled a hearing on June 15 for the purpose of considering the Norton Simon offer (T 347a).

Fuqua, by letter dated June 9 from counsel to Fuqua to the Trustee, made a second offer to purchase the Trust Property (the "second Fuqua offer"). A copy of this letter has been filed with the Court as a Supplemental Appendix by Fuqua. The second Fuqua offer matches the price that would be paid to the Trustee by Norton Simon (\$20.25 per share in cash; F 353a*). However, under the second Fuqua offer, rather than receiving the same cash price for their shares, the public stockholders of Avis would receive, pursuant to a tax-free merger of Fuqua and Avis, securities having a com-

*Numbers in parentheses preceded by "F" and followed by "a" refer to Fuqua's Supplemental Appendix.

bined value of at least \$20.75 (id.). Under the terms of the proposed merger each Avis shareholder would receive for each Avis share four tenths (.4) of a share of a new Fuqua 9 1/2% Cumulative Voting Preferred Stock, \$20.00 par value and Fuqua Common Stock having a market value of \$12.75.

The new Preferred Stock would have a \$20.00 par value, would pay a 9 1/2% cumulative dividend, would have one vote per share, would not be redeemable for five years and would have a conventional declining redemptive penalty. The number of shares of Fuqua Common Stock to be issued would be based on the average closing price during a 20-day period preceding the merger and would be subject to a minimum of one and maximum of 1.5 shares of Fuqua Common Stock (F354a).

The second Fuqua offer would have the following advantages to Avis public stockholders:

(a) It would be tax-free to the Avis stockholders in accordance with IRC § 368(a)(1)(A) and Regs. § 1.368-1(b).

(b) The estimated value of \$20.75 for each share of Avis is substantially above Avis' book value per share.

(c) The 9 1/2% cumulative dividend on the new preferred stock plus the current annual dividend on the Fuqua Common Stock of \$.36 per share would result in each Avis shareholder receiving a total dividend between \$1.12 to \$1.30 (depending upon the amount of Fuqua Common Stock

exchanged for each Avis share) or approximately three times the current \$.40 per share which the Avis shareholders are now receiving.

(d) The Avis shareholders would retain a substantial equity participation in the surviving corporation.

(e) Fuqua would vote its shares purchased from the Trustee for the proposed merger in the same proportion as the publicly held shares.

(f) It is the intent of Fuqua to retain the present operating management of Avis (F356a).

Fuqua has received no response from the Trustee regarding its second offer.

B. Rejection of the Norton Simon
Offer by the Avis Board

The Norton Simon offer was considered by the Avis board of directors on June 10. On June 11, The New York Times reported:

"An offer by Norton Simon, Inc. a conglomerate, to pay \$160 million in cash for Avis, Inc., the car rental company, was rejected yesterday in a development that surprised many Wall Street analysts.

"By a vote of 8 to 2, Avis directors decided after a three and a half hour morning session to reject the bid, apparently on the rationale that a higher price might be obtained either from Norton Simon or another suitor.

"The two dissenting directors were Richard Joyce Smith, the court-appointed trustee for Avis, and Mr. Smith's law partner, Robert C. O'Brien. The unexpected development cast a cloud of uncertainty over the widely forecast victory of Norton Simon over Fuqua Industries in the battle to buy the second-biggest car rental company in the country after the Hertz Corporation.

* * *

"Asked yesterday in a telephone interview whether the trustee would go ahead with the request to Judge Blumenfeld, in view of the Avis rejection, Mr. O'Brien said, 'Sure.'

* * *

"David Mahoney, chairman of Norton Simon, said the company's offer of \$20.25 in cash for all shares of Avis continued in effect. He added that if the court approved, Norton Simon could consummate the purchase from the trustee without approval of Avis directors."

(pp. 25, 27). As is set forth in Fuqua's main brief (pp. 16, 44-45), the Trustee took the position that Trustee Order No. 3 precluded consideration of Fuqua's initial offer. The offer was therefore never considered by the Avis board.

POINT I

THE INSTANT APPEAL IS NOT MOOT

The instant appeal is not moot. Rather the issues raised by Fuqua are all the more pressing in light of the Trustee's intention to sell the Trust Property to Norton Simon, Inc. not only to the exclusion of Fuqua and other possible bidders but also over the objections of the Avis board.

Fuqua initiated the instant proceeding in order to ultimately obtain amendment of Trustee Order No. 3 so that it would be able to purchase the Trust Property. In order to obtain such amendment in view of the refusal of the Trustee to even consider Fuqua's initial offer, Fuqua sought to intervene herein. Fuqua properly appealed to this Court from the District Court's denial of its motion to intervene (main br. 23-43) and for preliminary injunctive relief. The Trustee has still refused to consider not only Fuqua's (now revised) offer but also any offer other than that of Norton Simon, Inc., no matter how beneficial such offers might be to all concerned parties including the Avis stockholders. Fuqua's appeal is therefore not moot in any sense.

Further, as set forth in Fuqua's main brief (pp. 56-59), the jurisdiction of this Court on the instant appeal is plenary. Should Judge Blumenfeld on June 15 grant the Trustee's request that the Trust Property be sold to Norton Simon, Inc. without consideration of possible other offers from Fuqua or other interested parties and over the objection of the Avis board, this Court could properly consider the propriety of that action in the argument of the instant appeal on June 16. Any supplemental papers which might be required for the consideration by this Court of Judge Blumenfeld's action on June 15 could be filed on that date. Review of the District Court's action on that date would be the sole means of preventing the

irreparable harm that would result (to Avis and its stockholders, *as well as to Fuqua) from sale of the Trust Property to Norton Simon, Inc. without consideration of competing offers.

Further, it is possible that on June 15 the District Court could reject the Trustee's request in view of the opposition of the Avis board. In that case, the instant appeal would be in the same posture as it was prior to the Norton Simon offer and would not be moot.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in appellant's main brief, it is respectfully requested that the relief sought by appellant be granted.

Respectfully submitted,

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* See Reply Brief for Plaintiff-Appellant in Prather v. Avis, et al. (Docket No. 77-7240).

Service of ~~three~~ ^{Two} 2 copies of the within **REPLY BRIEF**
is admitted this 13TH day of JUNE 1977

Whitman & Ransom (by name)
Attys for Trustee-Respondent

Service of ~~three~~ ^{Two} 2 copies of the within **REPLY BRIEF**
is admitted this 13TH day of JUNE 1977

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By Charles A. Harrison